

To: Michigan Supreme Court
From: Michigan Bankers Association Trust Executive Committee
Re: ADM File No. 2003-62, Proposed Rule 1.7
Date: January 28, 2005

The Trust Executive Committee of the Michigan Bankers Association strongly objects to a portion of the language of the new comment 36 to MRPC 1.7. That language, as proposed by the Probate and Estate Planning Council, currently reads as follows, with emphasis added to the portion to which we object:

“A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying Rule 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing an adverse party in connection with a wholly unrelated matter, such as a real estate transaction or labor negotiation or another estate or trust administration.”

We propose striking the underlined phrase, ending that sentence with the word “negotiation.” We also propose adding the following sentence: **“A current representation of a corporate fiduciary in connection with the administration of another fiduciary estate shall be deemed a representation in a related matter.”** Finally, we propose expanding the examples of types of matters that would not constitute conflicts. With those changes, the proposed comment would read as follows:

“A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying Rule 1.7 with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing an adverse party in connection with a wholly unrelated matter, such as a commercial or personal loan, bankruptcy, a real estate transaction or a labor negotiation. **A current representation of a corporate fiduciary in connection with the administration of another estate shall be deemed a representation in a related matter.**”

These changes are required to protect corporate fiduciaries and their freedom to choose legal counsel without inadvertently waiving their lawyer’s duty of loyalty. A deemed waiver can create opportunity or incentive for the corporate fiduciary’s lawyer in one fiduciary

administrative matter to obtain for use against the corporate fiduciary in another administrative matter information about the corporate fiduciary's current policies, procedures, personnel, operations, facilities and investment strategies. This possibility may cause corporate fiduciaries to limit their selection of legal counsel in fiduciary administrations to lawyers who maintain ongoing legal representation of the corporation in its non-fiduciary capacity in order to overcome the opportunity for excepted disloyal conduct. That result would disadvantage the many attorneys who provide estate planning and administration legal services but who do not generally represent corporate fiduciaries with respect to other matters.

The Trust Executive Committee has no objection to the premise that representing a corporate fiduciary with respect to a fiduciary administration should not preclude a lawyer or firm from representing another party adverse to the corporation in a non-fiduciary matter. Indeed, as indicated above, the Committee believes that the list of non-disqualifying examples could usefully be expanded to include more types of legal representation, particularly commercial or personal loans and bankruptcy.

We therefore request that our proposed revision to Comment 36 be adopted. We appreciate the opportunity to comment on this matter of great importance to Michigan banks.